

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED
SEP 29 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Policy and Rules Concerning)	CC Docket No. 96-61
the Interstate, Interexchange Marketplace)	
)	CCB/CPD 97-54
Implementation of Section 254(g) of the)	
Communications Act of 1934, as amended)	

OPPOSITION OF THE STATE OF HAWAII

Kathryn Matayoshi,
Director

Charles W. Totto,
Executive Director

Division of Consumer Advocacy

Herbert E. Marks
James M. Fink
Squire, Sanders & Dempsey, L.L.P.
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

Its Attorneys

DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS

250 South King Street
Honolulu, Hawaii 96813

(808) 586-2770

September 29, 1997

No. of Copies rec'd 025
DATE SEP 29 1997

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	1
I. STATEMENT OF HAWAII'S INTEREST	2
II. PRIMECO HAS FAILED TO DEMONSTRATE ANY PROCEDURAL DEFICIENCY THAT WOULD WARRANT A STAY	3
III. PRIMECO'S MOTION DOES NOT SATISFY THE FOUR-PART TEST FOR GRANTING A STAY OF A COMMISSION ORDER	7
IV. THE STATE WOULD NOT OBJECT TO A NARROWLY TAILORED STAY LIMITED TO THE APPLICATION OF THE "AFFILIATE" REQUIREMENT TO MULTIPLE, COMPETING PARENT COMPANIES THAT JOINTLY CONTROL A CMRS PROVIDER	10
V. CONCLUSION	11

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Policy and Rules Concerning)	CC Docket No. 96-61
the Interstate, Interexchange Marketplace)	
)	CCB/CPD 97-54
Implementation of Section 254(g) of the)	
Communications Act of 1934, as amended)	

OPPOSITION OF THE STATE OF HAWAII

INTRODUCTION AND SUMMARY

The State of Hawaii (the "State")¹ hereby opposes the motion of PrimeCo Personal Communications, LP ("PrimeCo"), filed on September 23, 1997 in the above-captioned proceeding. In its motion, PrimeCo requests the Commission to stay the application of its rate integration rules to all Commercial Mobil Radio Service providers or, at a minimum, to stay application of the rate integration requirement to these providers' "affiliates."²

As demonstrated below, PrimeCo's suggestion that the Commission should stay its order because it failed to provide notice that its rate integration rules were applicable to CMRS providers is without merit. Moreover, PrimeCo has failed to satisfy the established four-part test for granting a stay of a Commission order. To the contrary, a grant of PrimeCo's

¹ This opposition is submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

² See FCC Public Notice, "Expedited Pleading Cycle Established for PrimeCo's Motion for Stay of Enforcement of Rate Integration Requirements as Applied to CMRS Providers," DA 97-2086, CCB/CPD 97-54 (rel. Sep. 25, 1997).

motion would violate the public interest principles of universal service and non-discrimination that underlie Section 254(g).

In light of the above, the Commission should deny PrimeCo's motion. At the same time, however, the State would not object to a limited, narrowly tailored stay of the affiliation provisions as applied to multiple, competing parent companies that jointly control a CMRS provider.

I. STATEMENT OF HAWAII'S INTEREST

For many years, the State has actively supported the Commission's efforts to eliminate discrimination in rates and services offered between Hawaii and the Mainland. The State has found that certain carriers have resisted the Commission's requirement that they geographically average their interexchange rates and integrate the rate and service structure applicable to Hawaii (and other offshore) points into the structure prevailing on the Mainland. This resistance has continued even after the enactment in 1996 of Section 254(g) of the Communications Act, which codified and expanded the FCC's long-standing commitment to geographic rate averaging and rate integration.

In order to remedy the on-going attempts to discriminate, the State, acting through its Governor and the Department of Commerce and Consumer Affairs, has been an active participant in CC Docket No. 96-61. In its pleadings in this docket, the State has specifically demonstrated that Section 254(g) applies to all interexchange services, including CMRS.³

³ For example, in May 1996, the State opposed AMSC's argument that Section 254(g)'s rate integration requirement should not apply to mobile services that experience significant cost differentials between service areas. See Reply Comments of the State of Hawaii at 23 n.49 (filed May 3, 1996). In October 1996, the State again opposed

II. PRIMECO HAS FAILED TO DEMONSTRATE ANY PROCEDURAL DEFICIENCY THAT WOULD WARRANT A STAY

PrimeCo suggests that the Commission should grant a stay because it failed to put CMRS providers on notice that Section 254(g) applied to them.⁴ In particular, PrimeCo alleges that "[n]either the Notice of Proposed Rulemaking nor the Rate Averaging/Integration Order even mentions CMRS carriers."⁵ These assertions are factually incorrect and without merit. As an initial matter, CMRS carriers should have known that they were subject to rate integration requirements because the language of Section 254(g) unambiguously states that it applies to all providers of interexchange services. Consistent with the plain meaning of the statute, the Notice of Proposed Rulemaking stated that an interexchange call:

includes all means of connecting point A and point B -- wireline or wireless -- and all network paths between those points. In the future, cellular, PCS, or other wireless interexchange services may provide an effective substitute for interexchange wireline service.⁶

Based on the Commission's statement in the Notice, some CMRS providers filed comments in which they asked the Commission to exempt CMRS providers from the rate

AMSC's attempt to evade the rate integration requirement. See Consolidated Opposition and Reply Comments of the State of Hawaii at 13-14 & n.34 (filed Oct. 21, 1996). At that time, the State also refuted GTE's argument that rate integration across affiliates would cause CMRS services to cross-subsidize landline services. Id. at 8-9. In January 1997, the State responded to the ex parte submission of the Cellular Telecommunications Industry Association ("CTIA"), which erroneously asserted that Section 254(g) does not apply to CMRS providers. See Opposition and Reply of the State of Hawaii at 8 n.21 (filed Jan. 28, 1997).

⁴ PrimeCo Motion for Stay at 5-6.

⁵ Id. at 6.

⁶ Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, Notice of Proposed Rulemaking, 11 FCC Rcd 7141, 7169 n.118 (1996) ("NPRM") (emphasis added).

integration requirement. These arguments are identical to those that PrimeCo is making now. For example, in the initial comment round in April 1996, AMSC⁷ argued that "the Congressional intent in adopting Section 254(g) was to codify existing Commission policies, which . . . have not been applied to mobile services such as that of AMSC."⁸ This argument was unsound then, and remains unsound today.⁹

AMSC also argued that its "service is not easily classified as 'interexchange' service. . . . Because the service is mobile . . . , AMSC typically cannot tell whether customers are using its system for interexchange or local service."¹⁰ Again, this 18-month-old argument is identical to the argument made by PrimeCo that its CMRS service "operates without regard to exchange boundaries" and thus interexchange calls are not easily identified.¹¹ The Commission rejected this argument in the First Report and Order, stating that AMSC's CMRS

⁷ AMSC's mobile satellite service is a CMRS service. See, e.g., Application of AMSC Subsidiary Corporation, 11 FCC Rcd 6830, 6833 (1996) ("AMSC, as a CMRS provider, is still required to file a tariff for international maritime mobile satellite services.").

⁸ Compare Comments of AMSC Subsidiary Corporation at 3 (filed Apr. 19, 1996) with PrimeCo Motion for Stay at 5 ("Section 254(g) was intended to codify the Commission's existing rate integration policy, which has never been applied to CMRS.").

⁹ As the State has demonstrated repeatedly, while Section 254(g) incorporated the concept of Commission's existing rate integration and rate averaging policies that were applied to AT&T's wireline service, the statute expanded these policies far beyond AT&T.

¹⁰ Comments of AMSC Subsidiary Corporation at 3.

¹¹ PrimeCo Motion for Stay at 5.

services "would appear to fall within the definition of interstate interexchange telecommunications services subject to Section 254(g)." ¹²

The participants in this proceeding also specifically addressed the treatment of CMRS affiliates. Back in June 1996, GTE filed an ex parte letter in which it argued that the Commission did not have authority to "mandate rate integration across affiliated service providers." ¹³ As part of its presentation, GTE specifically discussed its CMRS affiliates, GTE Mobilnet and GTE Airfone. ¹⁴

In the First Report and Order, the Commission considered -- and rejected -- GTE's affiliation argument. The Telecommunications Act, the agency concluded:

mandates that the Commission require rate integration among all states, territories, and possessions, and this goal is best achieved by interpreting "provider" to include parent companies that, through affiliates, provide service in more than one state. Moreover, nothing in the record supports a finding that Congress intended to allow providers of interexchange service to avoid rate integration by establishing or using their existing subsidiaries to provide service in limited areas. ¹⁵

¹² Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, 11 FCC Rcd 9564, 9589 (1996) ("First Report and Order"). After the First Report and Order, CMRS providers continued to argue the issue. For example, in December 1996 CTIA filed an ex parte letter arguing that CMRS providers should be exempted from Section 254(g) requirements. See Letter from Howard J. Symons, Attorney for CTIA, to William Caton, FCC Secretary, CC Docket No. 96-61 (filed Dec. 11, 1996).

¹³ Letter from Gail L. Polivy, Attorney for GTE Service Corporation, to William F. Caton, FCC Secretary, CC Docket No. 96-61, at 2 (filed Jun. 20, 1996).

¹⁴ Id. at 8.

¹⁵ First Report and Order, 11 FCC Rcd at 9598 (emphasis added).

In September 1996, both GTE and U S WEST filed petitions for reconsideration specifically addressing the CMRS issue. GTE voiced its concern that rate integration across affiliates would require cross-subsidization between its CMRS and landline interexchange services.¹⁶ U S WEST asked the Commission to clarify that it need not cross-integrate the interexchange rates of U S WEST Media Group, its CMRS subsidiary, with the interexchange rates of U S WEST Communications Group, its landline telephone subsidiary.¹⁷ At the same time, however, U S WEST expressly acknowledged that rate integration applied to all affiliates within each "targeted stock" subsidiary.¹⁸

PrimeCo asserts that it is controlled by U S WEST, which is one of the partners in the joint venture.¹⁹ In light of U S WEST's acknowledgment regarding the applicability of Section 254(g) to CMRS providers, PrimeCo cannot now argue that it had no notice that CMRS providers would be subject to the rate integration requirements in general, and the affiliation requirement in particular. Consequently, there is no basis for the Commission to grant a stay to remedy the "procedural defect" alleged by PrimeCo.

¹⁶ GTE Petition for Reconsideration and Clarification at 9-10 n.15 (filed Sep. 16, 1996).

¹⁷ U S WEST, Inc.'s Petition for Clarification, or, in the Alternative, Reconsideration at 4-6 (filed Sep. 16, 1996).

¹⁸ Id. at 5-6 ("[I]ndividually U S WEST Communications Group and U S WEST Media Group are, of course, subject to rate integration.") (emphasis added).

¹⁹ PrimeCo Motion for Stay at 3.

III. PRIMECO'S MOTION DOES NOT SATISFY THE FOUR-PART TEST FOR GRANTING A STAY OF A COMMISSION ORDER

PrimeCo's request for a stay also should be denied because the carrier has failed to satisfy the four-part test enunciated in Virginia Jobbers and Washington Transit.²⁰ PrimeCo's assertion that a stay "may not require satisfaction of the four-part test"²¹ is unsupported. Indeed, the Commission has routinely rejected requests for stay that do not satisfy this well-established test.²² As demonstrated below, PrimeCo plainly cannot prevail under this standard.

There is virtually no chance that PrimeCo will be able to demonstrate that Congress did not intend to subject CMRS providers to the rate integration requirement. The Commission addressed this issue its First Report and Order. In that Order, the agency it ruled that AMSC's mobile satellite services -- which are CMRS -- are subject to Section 254(g).²³

There a several strong reasons why the Commission was correct to conclude that CMRS services are subject to Section 254(g). First, the express language of Section 254(g)

²⁰ Under these cases, the four factors to be considered are: (1) a likelihood of success on the merits by the party requesting the stay; (2) irreparable harm in the absence of a stay; (3) no substantial harm to other interested parties if the stay is granted; and (4) public interest in favor of a stay. See Virginia Petroleum Jobbers Association v. Federal Power Commission, 259 F.2d 921, 925 (D.C. Cir. 1958); Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977).

²¹ PrimeCo Motion for Stay at 4 n.8.

²² See e.g., Applications of Tidewater Communications, Inc., Memorandum Opinion and Order and Forfeiture Order, File Nos. BR-950530UZ; BRH-950530UT; BRH-950530US, FCC 97-271, at ¶ 12 (rel. Aug. 5, 1997) ("The licensee does not even discuss any of the four required elements of the test in its Petition. Rather it simply makes an unsupported request for a stay. Accordingly, we deny its request for a stay . . .").

²³ First Report and Order, 11 FCC Rcd at 9589.

applies to all "providers of interexchange telecommunications services."²⁴ It makes no exceptions for mobile interexchange services. Second, subjecting CMRS carriers to Section 254(g) would not be unreasonably burdensome. This is because CMRS providers increasingly provide nation-wide service, thereby limiting the burden on ratepayers. Moreover, a large part of the infrastructure used by CMRS providers involves landline networks, which also are subject to Section 254(g) requirements. In addition, contrary to PrimeCo's assertions, the cost structure of CMRS service -- which may involve different combination of toll and air time charges in different geographic regions-- is not unique. Landline carriers face different access charge structures in different locations, yet are fully able to comply with the geographic integration requirements.

Because PrimeCo is not likely to succeed on the merits, its motion for stay should be automatically denied. There is no need to examine the other three factors.²⁵ Indeed, any consideration of these other factors will only confirm the extent to which PrimeCo's motion lacks merit.

PrimeCo plainly cannot show that, absent grant of the stay, it will suffer irreparable harm. To meet its burden of showing irreparable harm, PrimeCo would have to demonstrate that the alleged harm is "both certain and great; . . . actual and not theoretical."²⁶ PrimeCo has not. Rather, it simply asserts that, as applied to it, the affiliate requirement

²⁴ 47 U.S.C. § 254(g).

²⁵ See Administration of the North American Numbering Plan Carrier Identification Codes (CICs), CC Docket No. 92-237, DA 97-1524, at ¶ 12 (rel. Jul. 18, 1997) ("NANP Order") ("We need not examine all four factors if we find that a party fails to meet its burden on any one of these factors.").

²⁶ Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

"raises" antitrust implications.²⁷ In the past, the Commission has denied motions for stay when, as is the case here, allegations of irreparable harm are unsupported and speculative assertions.²⁸ It should do so here.

PrimeCo clearly fails the third prong of the test: it has not demonstrated that grant of the stay would not harm other parties. CMRS services are becoming real substitutes for such interexchange services and bring critically needed competition to offshore consumers.²⁹ It is abundantly clear that consumers on Hawaii and other offshore points would continue to pay discriminatory CMRS rates if PrimeCo's motion were granted. Such discrimination is precisely what Section 254(g) was enacted to prevent.

PrimeCo's argument that until passage of Section 254(g) CMRS providers were not subject to a rate integration requirement is both incorrect and irrelevant. CMRS providers were, in fact, subject to rate integration requirements articulated by the Commission prior to the enactment of the Telecommunications Act of 1996. In any case, any lingering question regarding the applicability of these requirements to CMRS providers was resolved with the adoption of the First Report and Order, which became effective on September 16, 1996. Solely because of their locations, Hawaii and other offshore points have continued to be subject to discriminatory treatment in the provision of telecommunications services. Grant of the stay

²⁷ PrimeCo Motion for Stay at 7-8.

²⁸ See, e.g., National Exchange Carrier Association, Inc., AAD 97-2, DA 97-1343, at ¶ 7 (rel. Jun. 27, 1997) ("highly speculative" assertions cannot be regarded as "irreparable harm"); NANP Order at ¶ 13 ("irreparable harm" is an "exacting standard").

²⁹ See NPRM, 11 FCC Rcd at 7169 n.118.

would deprive these consumers of their established rate integration rights and force them to continue to be subject to discrimination.

PrimeCo's failure to satisfy the third prong of the test means that it has not satisfied the fourth prong either (i.e., that the stay must be in the public interest). Discriminating against Hawaii and other offshore points in violation of the public interest objectives of Section 254(g) is obviously not in the public interest. Rate integration and geographic averaging are needed to promote universal service and to ameliorate the impact which regionally disparate costs otherwise impose on consumers in different parts of the country.

IV. THE STATE WOULD NOT OBJECT TO A NARROWLY TAILORED STAY LIMITED TO THE APPLICATION OF THE "AFFILIATE" REQUIREMENT TO MULTIPLE, COMPETING PARENT COMPANIES THAT JOINTLY CONTROL A CMRS PROVIDER

PrimeCo further request that, if the Commission declines to stay the applicability of the entire rate integration rule to CMRS providers, it should at least stay application of the affiliate requirement. Under this requirement, an "affiliate" is defined to include companies that control a provider.³⁰ In support of this request, PrimeCo notes that its parent companies -- AirTouch, U S WEST and Bell Atlantic -- appear to be affiliates and, therefore, appear to be required to integrate their CMRS rates. PrimeCo further speculates that, under the Commission's requirements, they might be obligated to integrate their landline interexchange rates as well.

The State recognizes that, because of its ownership structure, application of the affiliation requirements to PrimeCo presents novel issues. Therefore, the State would not object

³⁰ 47 U.S.C. § 32.9000.

to a narrowly tailored stay of the affiliation provisions as applied to multiple, competing parent companies that jointly control a CMRS provider. In addition, the Commission may wish to clarify that the rate integration concept applies only to comparable services, so that while the rates of a company's CMRS services must be integrated across affiliates, they need not be integrated with the rates of the company's landline or other unlike services.³¹

At the same time, however, the State strongly opposes a stay that would permit CMRS affiliates under the common ownership and control of a single corporate parent to provide services on a non-integrated basis. Such a stay would allow companies "to avoid the Congressional mandate of integrated interexchange rates by using or creating multiple interexchange carrier subsidiaries, each serving a separate geographic area."³²

V. CONCLUSION

The Commission should deny PrimeCo's motion for stay of Section 64.1801 of the Commission's rules as it applies to CMRS carriers and should deny PrimeCo's motion for stay of the affiliate requirement. At most, the Commission should grant a limited, narrowly

³¹ See Consolidated Opposition and Reply Comments of the State of Hawaii at 8-9 (filed Oct. 21, 1996).

³² Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as amended, First Memorandum Opinion and Order on Reconsideration, CC Docket No. 96-61, FCC 97-269, at ¶ 15 (rel. July 30, 1997).

tailored stay to allow further consideration of the "affiliate" requirement to multiple, competing parent companies that jointly control a CMRS provider.

Respectfully submitted,

THE STATE OF HAWAII

By: James M. Fink
Herbert E. Marks
James M. Fink

Kathryn Matayoshi,
Director

Charles W. Totto,
Executive Director
Division of Consumer Advocacy

DEPARTMENT OF COMMERCE
AND CONSUMER AFFAIRS
250 South King Street
Honolulu, Hawaii 96813
(808) 586-2770

STATE OF HAWAII

Squire, Sanders & Dempsey, L.L.P.
1201 Pennsylvania Avenue, N.W.
P.O. Box 407
Washington, D.C. 20044
(202) 626-6600

Its Attorneys

September 29, 1997

CERTIFICATE OF SERVICE

I, James M. Fink, do hereby certify that on this 29th day of September, 1997, I have caused a copy of the foregoing "Opposition of the State of Hawaii" in CC Docket No. 96-61, CCB/CPD 97-54, to be hand delivered upon the persons listed below.


James M. Fink

James D. Schlichting
Chief, Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

Patrick J. Donovan
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

William J. Bailey
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. Room 518
Washington, D.C. 20554

Wanda Harris (2 copies)
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W. Room 518
Washington, D.C. 20554

Jeanine Poltronieri
Associate Chief,
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W. Room 5002
Washington, D.C. 20554

International Transcription Services
1231 20th Street, N.W.
Washington, D.C. 20036

Senator Daniel K. Inouye
United States Senate
722 Hart Office Building
Washington, D.C. 20510-1101

Mrs. Margaret Cummisky
Legislative Director
Office of Senator Daniel K. Inouye
722 Hart Office Building
Washington, D.C. 20510-1102

Kevin M. Joseph
Minority Staff Counsel
Senate Committee on Commerce, Science &
Transportation
516 Dirksen Office Building
Washington, D.C. 20510-6130

Senator Daniel K. Akaka
United States Senate
720 Hart Office Building
Washington, D.C. 20510-1101

Ms. Nancy Langley
Office of Senator Daniel K. Akaka
United States Senate
720 Hart Office Building
Washington, D.C. 20510-1101

Representative Patsy T. Mink
United States House of Representatives
2135 Rayburn Office Building
Washington, D.C. 20515-1101

Representative Neil Abercrombie
United States House of Representatives
1233 Longworth Office Building
Washington, D.C. 20515-1101